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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

SUPREME COURT
OF THE UNITED STATES

Gretchen Thompson et al.,

Petitioners, Appellants, Plaintiffs

v.

Mary Greeley Medical Center, et al.,

Respondents, Appellees, Defendants.

On Petition for Writ of Certiorari to the Iowa Supreme Court

PETITION FOR WRIT OF CERTIORARI SUBMITTED BY APPELLANTS

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QUESTION PRESENTED FOR REVIEW:

1. Do the Iowa courts of review deny citizens their rights to Due Process and Equal Protection when those courts establish and/or sanction arbitrary judicial classifications for the commencement of statutes of limitations, which are contrary to precedent and the express language of the statutes at issue?

2. Is the judicially applied "inquiry notice" standard for the commencement of the statute of limitations in non-capped recovery, health industry related, suits in Iowa unconstitutionally vague, arbitrary and capricious?

LIST OF PARTIES TO THE PROCEEDING:

Plaintiffs/Appellants/Petitioners:
Todd and Gretchen Thompson, Husband and Wife and their minor children, Merika and Jake.

Defendants/Appellees/Respondents:
Mary Greeley Medical Center; Regent Medical division of SSL Americas, Inc.; Maxxim Medical Corporation; Ansell Health Care Products, Inc.; Safeskin Scientific Corporation; McKesson General Medical Corporation; Baxter Healthcare Corporation; Kreisers, Incorporated; McFarland Clinic, P.C.; Dr. James Downard; and Dr. Terry McGeeney.

(Note: Plaintiffs settled with Regent Medical division of SSL Americas, Inc.during the appeal and Maxxim Medical Corporation has now filed for bankruptcy protection.)

CITATIONS OF OFFICIAL/UNOFFICIAL REPORTS OF OPINIONS ENTERED IN THIS CASE:

Iowa Court of Appeals, No. 3-119/02-0437
Gretchen W. Thompson et al., v. Mary Greely Medical Center et al.

Iowa Supreme Court No. 02-437, Story County No. LACV039385
Gretchen W. Thompson et al., v. Mary Greeley Medical Center et al.

BASIS FOR THIS COURT'S JURISDICTION:

a. The District Court entered a "Orders of Summary Judgment" summarily dismissing Plaintiffs' causes of action for medical malpractice and products liability on February 25, 2002 for failing to file within the statutes of limitation.

b. Plaintiffs appealed and the matter was referred to the Iowa Court of Appeals for determination. Its opinion affirming the District Court in all respects was filed on May 14, 2003.

c. Plaintiffs Petition to the Iowa Supreme Court for Further Review was denied on August 1, 2003.

d. Pursuant to Rule 29.4(c) Plaintiffs are making the statement that the constitutionality, as applied, of the statutes of limitations, Iowa Code sections 614.1(2) and 614.1(9) are being questioned and thus 28 U.S.C. section 2403(b) may apply.

This Petition for Writ of Certiorari is filed pursuant to 28 U.S.C. sections 2101(c) and 2104.

CONSTITUTIONAL PROVISIONS APPLICABLE:

Fifth Amendment to U.S. Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when the actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty or property, without**

due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to U.S. Constitution, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **not shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

IOWA CODE PROVISIONS:

Iowa Code Section 614.1 Period. Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:

(2) *Injuries to person or reputation -- relative rights -- statute penalty.* Those founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, within two years.

(9) *Malpractice.*
(a) Except as provided in paragraph "b", those founded on injuries to the person or wrongful death against any physician and surgeon, osteopath, osteopathic physician and surgeon, dentist, podiatric physician, optometrist, pharmacist, chiropractor, physician assistant, or nurse, licensed under chapter 147, or a hospital licensed under chapter 135B, arising out of patient care, within two years after the date on which the **claimant knew,** or through the use of reasonable diligence

should have known, or received notice in writing of the **existence of, the injury** or death for which damages are sought in the action, whichever of the dates occurs first, but in no event shall any action be brought more than six years after the date on which occurred the act or omission or occurrence alleged in the action to have been the cause of the injury or death unless a foreign object unintentionally left in the body caused the injury or death.

STATEMENT OF THE CASE:

Plaintiff Gretchen Thompson contracted a latent latex allergy as a result of working at and being treated at Mary Greeley Medical Center from 1991 through October 1995 and thereafter. During this period she suffered many ailments for which she presented to the McFarland Clinic. The McFarland Clinic had been her primary medical care provider from the time that she was a child. In 1996 she commenced work at McFarland Clinic in the records department. She became pregnant and the Clinic had a benefits program which provided free medical care for employees by Clinic doctors. Dr. McGeeney was Gretchen's family physician and Dr. Downard, her OB/GYN. Her pregnancy was difficult. She began to have significant difficulty with inappropriate sinus tachychardia of as much as 170 beats per minute at rest; bloody diarrhea; nausea; headaches; dizziness; malaise; intolerance for foods; neurological difficulty and recurrent rashes. She was referred to a cardiologist who found nothing wrong with her heart but suggested that additional investigation be conducted into some "metabolic cause" of the etiology of her heart palpitations. Despite all of this, her physicians told her that all of her symptoms were "pregnancy related" only. She was never diagnosed with latex allergy nor referred for evaluation. Latex allergies are progressive. As a result, the level of Ms. Thompson's allergy escalated to a serious life threatening level.

During this same period, Mary Greeley Medical Center was promulgating Latex Allergy Admission Protocols which required that patients be screened upon admission to determine whether they were allergic or sensitive to latex so that exposure could be minimized or eliminated. The screening process involved asking a series of intake questions pertaining to experiences patients had with eating certain foods and using usual products, like rubber bands. A positive answer to a

number of the questions, generally, would indicate at least a "latex sensitive" patient. The protocols were initially promulgated in September 1996 and finalized in February 1997. Gretchen was admitted to Mary Greeley Medical Center in May 1997 and June 1997 for pregnancy related matters. On neither occasion were the protocols used. The protocols required that the admitting doctors determine whether the patient was latex sensitive or allergic.

Between 1991 and 1997 Gretchen Thompson presented approximately 37 times to her physicians at the McFarland Clinic for various problems, many of which indicated a sensitivity and/or allergy to latex. No latex allergy was ever diagnosed. No referral was ever made to either of the clinic's allergists, one of whom had published in regard to latex allergy.

In 1997 Gretchen moved with her husband Todd to Greenwood, South Carolina. In July, 1998 she became pregnant again and was referred by her family physician there to Dr. Carter, an OB/GYN for care. Her first visit with Dr. Carter was on August 6, 1998. During intake questions Dr. Carter's nurse asked Gretchen questions about food intolerance's and whether she had trouble using rubber bands or whether she had ever had trouble during dental exams or with latex gloves. Gretchen indicated that she did have an intolerance now to certain foods that she previously loved, like avocados, and that while wearing gloves as a food service worker six or seven years earlier at Mary Greeley Medical Center, she had some itching. She said, however, that she had been told while wearing the gloves at Mary Greeley that the problem with itching was due to the powder and that during the entire period of her prior pregnancy , she had been told that her difficulties with food were pregnancy/hormone related. The nurse told Dr. Carter, who then told Gretchen that she might have a "latex allergy". Gretchen had never heard of latex

allergy and asked what it was, generally, and whether Dr. Carter thought she had it. He told her that it was rare, and that he did not think that she had it, but that he was going to refer her to an allergist to be sure. Gretchen did not present to Dr. Carter on August 6, 1998 for any reason other than to connect with him for the purpose of having him deliver her baby. She did not present with any "problem" related to latex allergy on that day. In fact, Ms. Thompson did not end up using Dr. Carter as the OB/GYN for her second pregnancy. She changed to another OB/GYN after September, 1998.

Gretchen was referred to allergist Dr. Gottlieb on August 11, 1998. On that day he told her that he had never before had a latex allergic patient; that generally the allergy manifested in glove wearing professionals who wore gloves for 30 years or more; that he would need to run tests to determine whether she had the allergy; and made note of her prior doctors' representations that the difficulties she experienced in her prior pregnancy were pregnancy/hormone related and/or food related. He asked that she take a blood test to obtain a RAST result and noted that he could not conduct food testing until after the delivery of her child, anticipated in March 1999. She complied with the blood test request three days later on August 14, 1998. Dr. Gottlieb received the results of the test on August 18, 1998 indicating "positive RAST" results. That result, alone, however, could not definitively diagnose latex allergy, as a physician must observe a manifestation associated with exposure to latex to make a diagnosis. During the August 11 visit it was agreed that Gretchen would return in 30 days for a follow up visit. Dr. Gottlieb told her to avoid latex.

Around August 24, 1998 Gretchen began to experience the inappropriate sinus tachychardia she had experienced during her first pregnancy and telephoned Dr. Carter, who referred her to a cardiologist, Dr. Pritchard. Dr. Carter's notes for that

referral do not reference "latex allergy". Dr. Pritchard sent Gretchen to the hospital to be fitted with a portable heart monitor to wear at home so that her heart rate could be monitored. Patches were put on her chest. She was told that they were not latex. After wearing the patches for a period of time her chest began to itch and she developed a rash. On August 28, 1998 she called Dr. Gottlieb's office to schedule an appointment for him to see her. She went for the scheduled appointment on August 31, 1998 at which time Dr. Gottlieb was able to see a manifestation of a reaction associated with exposure to latex (the leads were in fact latex) and he thusly made the diagnosis of "latex allergy" on that day. On August 31, 1998 he could make the diagnosis because he had, (1) the RAST results, and (2) observed a reaction associated with exposure to latex.

Much effort was then undertaken by Gretchen's physicians to adopt protocols for the hospital there in Greenwood, South Carolina so that she could present there for the delivery of her child in March 1999 in such a way so that she would not be exposed to latex in the hospital environment. Gretchen and her mother were involved in the process. In October 1998 Gretchen and her husband purchased a computer and she began to do research on the internet about latex allergy and its effects. She learned that the allergy is progressive. That each exposure and reaction causes an increase in the level of IGE antibodies; that nothing can be done to reduce that level; that once a certain level is achieved usual methods of counteracting the anaphylactic reactions, like Benadryl and/or Epinephrine don't work, and the patient dies. Knowing one has a latex allergy is critical in avoiding the exposures so as to keep the allergy at a level which is not life threatening.

In August 1999 she was referred by Dr. Gottlieb to a latex allergy specialist, Dr. Dennis Ownby in Augusta, Georgia for a

confirmation of her latex allergy. Food testing was completed by Dr. Gottlieb after delivery of Gretchen's child in March 1999.

In September, 1999 Gretchen found a case on the internet where suit had been brought against latex manufacturers and distributors for negligence in the manufacture and design of latex products. Until that time she had no idea that the negligence of another could be the cause of her "allergy" or that her "allergy" could be an "injury" for which a cause of action could be brought. She had other allergies to sulfa and soy, but did not understand that she could sue someone because she had those allergies.

The Thompson family moved back to the State of Iowa in 2000. On August 30, 2000 they brought suit in Ames, Story County, Iowa against Gretchen's physicians, Dr. Downard and Dr. McGeeney ,the McFarland Clinic, P.C. and Mary Greeley Medical Center for failure to diagnose her condition resulting in an escalation of the severity of her condition (now life threatening) and against then "unknown" manufacturers and distributors of latex gloves and products to which she was exposed during the time that she worked for and was treated at Mary Greeley Medical Center. She promulgated Interrogatories and Requests for Production of Documents to Mary Greeley requesting the identities of the manufacturers and distributors. Mary Greeley was reticent in providing the information, but after threatening a Motion to Compel, they finally complied and provided the information January 2, 2001. The Thompsons amended their suit to name the Products Defendants individually on January 11, 2001 and served them all by the end of March 2001.

Plaintiffs provided their expert opinion reports as to the professional liability of the doctors and the hospital as required

by Iowa law. The doctors responded with their reports. Depositions of Dr. McGeeney, Dr. Downard some McFarland Clinic representatives and a partial deposition of Ms. Thompson followed. Defendants then filed their motions for Summary Judgments on the statute of limitations.

The Medical Malpractice Defendants (Drs. McGeeney, Downard, and Mary Greeley Medical Center) argued that "inquiry notice" commenced the Medical Malpractice statute, Iowa Code Section 614.1(9) when Ms. Thompson began her inquiry into the existence of her "purely latent" injury of latex allergy. The Products Defendants (Regent Medical division of SSL Americas, Inc., Maxxim Medical Corp., Ansell Health Care Products, Inc.; Safeskin Scientific Corp., McKesson General Medical Corp., Baxter Healthcare Corp., and Kreisers, Inc." argued, essentially, that even if the Plaintiffs' suit was timely filed as to the Medical Defendants, that there was only one day of tolling as to the Products claims, that being from August 30 to August 31 and that they should have amended their suit and served all of the defendants within one day of learning their individual identities and that the Plaintiffs filed and served out of time under Iowa Code Section 614.(2).

Plaintiffs argued that no case cited by any defendant established that "inquiry notice" commenced the running of the statute of limitations in a "purely latent" injury case prior to the existence, or diagnosis of the injury.

The District Court entered an Orders on Summary Judgment on February 25, 2002 dismissing all of Plaintiffs' claims against all Defendants finding, in part, that inquiry noticed commenced the running of both the medical malpractice and the products liability statutes either on August 6, 1998 when Ms. Thompson first saw Dr. Carter, or August 11, 1998 when she first saw Dr. Dr. Gottlieb, or on

August 18, 1998 when Dr. Gottlieb first received the RAST blood results, or on August 24 (or 28) 1998 when Ms. Thompson had the latex leads placed on her chest for the portable heart monitor and that the Thompsons' suit filed on August 30, 2000 was beyond the two year period of limitations. (See Appendix pp 26a) The District Court also found that Gretchen Thompson suffered from a "purely latent injury". (See Appendix Id) Plaintiffs appealed. Defendants did not cross appeal on any issue.

Plaintiffs' Proof Brief was filed on or about May 15, 2002. Their Final Brief was filed September 9, 2002. On September 5, 2002 the Iowa Supreme Court rendered an opinion in *Perkins v. HEA of Iowa,* 651 N.W.2d 40 (Iowa 2002) which addressed and resolved an issue directly on point with the issue presented in Thompson, that being: What triggers the commencement of the statute of limitation in a purely latent injury case? The "date of diagnosis" was the date determined to trigger commencement in the purely latent injury instance in *Perkins,* even though the claimant in that instance was a medical professional who had begun an investigation, or commenced "inquiry " into the existence of her injury, six years before diagnosis. *Perkins* was argued extensively during Oral Argument on April 1, 2003 in support of Plaintiffs' position that in a purely latent injury situation the injury must be in "existence", thusly diagnosed, prior to the commencement of the statute of limitations.

The Court of Appeals issued an opinion on May 14, 2003 which affirmed the District Court in all respects; which did not use as a basis for its affirmance any "purely latent" injury, discovery rule case; and which ignored *Perkins* altogether.

Plaintiffs petitioned the Iowa Supreme Court for Further Review arguing that the Court of Appeal's failure to address

and apply the discovery rule analysis in *Perkins* deprived the Thompsons of Due Process and Equal Protection of the law just settled by the Iowa Supreme Court; that the Thompson decision by the Court of Appeals was virtually the same analysis pertaining to a virtually identical issue by the same panel of judges which had just been rejected by the Iowa Supreme Court in the *Perkins* decision; that the Court of Appeals determination in Thompson was not supported by any authority and in fact was contraindicated by authority cited by the court; that the decision was arbitrary and capricious; and that the decision was, in effect, not only a wholesale disregard for the rule of law but also a wrongful infringement by the judiciary on the prerogative of the legislature by the arbitrary imposition of a judicial classification resulting in a restriction on suits seeking non-capped damages against health care industry defendants, or, judicial tort reform. After consideration, en banc, with two justices not participating, the Iowa Supreme Court entered an Order denying further review on August 1, 2003. (See Appendix, p45a-46a)

REASONS FOR ALLOWANCE OF THE WRIT:

Review by the United States Supreme Court is warranted because this case involves fundamental principles of fairness, separation of powers, judicial restraint, Due Process, Equal Protection and the basic Rule of Law. Individual rights are being abrogated by a segment of government which is charged with protecting and enforcing those rights. When courts of review are the offenders, no recourse is available, absent this one.

In *Fitzgerald v. Racing Association of Central Iowa et al.*, 123 S.Ct. 2156; 156 L.Ed.2d 97 (2003) this Court addressed, yet again, the issue of whether *legislative* classifications

rationally based upon plausible policy reasons constituted violations of Due Process and Equal Protection. Said the Court:

> ". . . the Constitution grants legislators, not courts, broad authority (within the bounds of rationality) to decide whom they wish to help with their . . . laws and how much help those laws ought to provide. "The 'task of classifying persons for . . . benefits . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be be placed on different sides of the line,' and the fact the line might have been drawn differently at some point[s] is a matter for legislative, rather than judicial, consideration." *Id.* at 2159.

In *Central State University v. American Assoc. of University Professors*, 526 U.S. 124; 119 S.Ct. 1162; 143 L.Ed.2d 227 (1999) in addressing a similar issued, this Court stated:

> " We have repeatedly held that a classification neither involving fundamental rights nor proceedings along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between disparity of treatment and some legitimate governmental purpose."
>
> . . .
>
> "A State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification."
>
> *Id.* at 231

This case offends both decisions. (1) The Iowa courts of review have deprived the Thompsons of a fundamental right. The Thompsons have been deprived of their right to advance their property interest -- their lawsuit. (2) The Iowa courts established a *judicial classification* for the Thompsons which applied the Discovery Rule to them in such a way as to deprive them of their suit when others (Perkins) are allowed their claims and which favored the Defendants, both the medical malpractice and products liability Defendants, contrary to precedent and absent any legislative enactment. (3) The Iowa courts of review put forth no rational relationship whatsoever justifying the disparate treatment. Although it is settled that the Iowa legislature is not required to produce evidence of its rationality, the same does not appear to be true for the courts, especially when the courts are proceeding in a way contrary to Supreme Court authority and contrary to the U.S. constitution.

Under the *Fitzgerald* and *Central State* analyses, the Iowa legislature could not get away with the disparate treatment foisted upon the Thompsons, and the legislature has, at least, a constitutional leg upon which to stand. How is it then, that a branch of government with absolutely no constitutional insulation, may abrogate the Thompsons' rights with impunity? They may, because there is no one to tell them they can't -- unless this Court elects to do so.

ARGUMENTS AND AUTHORITIES:

1. The Thompsons were denied Due Process and Equal Protection when the Court of Appeals refused to apply the Rule of Law of Perkins concerning the commencement of the statutes of limitations in a purely latent injury case. The Court of Appeals decision was arbitrary and capricious and discriminatory. The Iowa Supreme Court's failure to review

the matter, so as to enforce its own precedent and to protect the Constitutional rights of the Thompsons, in essence, sanctioned the judicial classification process.

The Court of Appeals found that the statute of limitation began to run:

> " . . . when Dr. Carter told Gretchen Thompson she might have a latex allergy. The district court properly concluded the statute of limitations began to run on August 6, 1998, and plaintiffs' suit, filed on August 30, 2000, was barred by section 614.1(9).
> (Appendix. p 42a)

This conclusion is directly contrary to that initially reached by the Court of Appeals, en banc and subsequently affirmed by the Iowa Supreme Court in *Perkins v. HEA of Iowa, Inc.*, 651 N.W.2d 40 (Iowa 2002).

In Perkins a worker's compensation claimant health care worker was sprayed with blood on October 2, 1990 while checking a patient with a leg shunt. On the same day she was told by the charge nurse that the patient had Hepatitis C. She understood that she might have contracted Hepatitis C. from the exposure. Under the analysis advanced in Thompson, Perkins was put on "inquiry notice' on October 2, 1990, the day she was told of the possibility of contracting the disease. Perkins, thereafter, continued her investigation into whether she had contracted the disease by taking a blood test on the 9th of October, 1990. It does not appear that test, however, could have been determinative at that time, as the notes to the case indicate that sufficient antibody indication would not have been forthcoming until the passage of a period of 15 to 16 weeks after contraction. Perkins failed to take additional blood tests six months and then one year after exposure, despite the fact

that she understood that the tests were necessary to diagnose the condition. The Supreme Court found that the two year statute of limitation did not commence until such time as Ms. Perkins was diagnosed with Hepatitis C on April 20, 1996, almost six years after she began her inquiry into the existence of the disease. The found that no "injury" occurred prior to that time opining:

> "In all of the Iowa cases discussed in this opinion, the claimant knew he or she was injured, not merely exposed to injury, before the duty to inquire arose . . . in all of the cases the claimant knew he or she had suffered an injury before the statute of limitations began to run . . . "
>
> "If there is anything clear in this record with respect to the 'condition' . . . it is that as of the time Perkins is charged with inquiry notice she had not been injured. She had been exposed through a traumatic and frightening event, but she was not injured."
> *Id.* at 45.
>
> . . .
>
> "inquiry notice does not arise from 'every minor ache, pain, or symptom,' *Swartzendruber,* 613 N.W.2d at 650, inquiry notice surely cannot be triggered when there is no ache, pain, or symptom of an injury. An injury is generally defined as 'the violation of another's legal right, for which the law provides a remedy' . . . worker's compensation law does not provide a remedy for a

person who has merely been exposed to injury."
Id at 46

Like Perkins, Gretchen Thompson's injury must have "existed" prior to her being able to pursue a legal remedy against medical defendants for "failure to diagnose" and/or against the products defendants for causing an "injury". Perkins established that no cause of actions existed until an injury existed and the injury did not exist in a purely latent situation until it was diagnosed. The situation is identical to that in Thompson. Gretchen Thompson could not diagnose her condition. Yet, the Court of Appeals, simply picked one of the dates identified as "possible" triggers by the District Court, the first one, August 6, 1998 when Gretchen Thompson first heard the words, "latex allergy". That is contrary to Perkins and contrary to the express language of the statutes at issue.

Iowa Code section 614.1(9) *Medical Malpractice* is a Discovery Rules statute and specifically states that the statute doesn't commence until a plaintiff knows, or should know of the "existence" of the injury for which damages are sought. The word "existence" establishes that the legislature meant "fact of" not "possibility of" or "suspicion of". Gretchen Thompson could not have known of the existence of her allergy on August 6, or on August 11, or on August 18, or on August 24 or on August 28 of 1998. It was not until August 31, 1998 that she was diagnosed. It was not until that date that her physician was in possession of the information necessary to make a diagnosis. She filed suit within two years of that date -- yet she and her family are denied their claims -- their property because the Iowa court of review have decided, arbitrarily, that they may not proceed.

Not one case supports the determination that the statute commenced to run on August 6, 1998. The Thompsons are being held to an unprecedented standard. Consider the following controlling authority:

- *Sparks v. Metalcraft, Inc.*, 408 N.W.2d 347 (Iowa 1987): 1973, Sparks suspected that neurological problems her experienced were associated with exposure to solvents at work; 1977 a physician advised Sparks that he had a degree of injury; 1980 Sparks hospitalized and told by physician that problem is partially related solvents; September 1980 specialist writs a report connecting his problems to Metalcraft solvents; Iowa Supreme Court finds inquiry notice commences the running of the statute of limitations as to Sparks' products liability claims in November 1980 when he knew that Metalcraft solvents injured him.

- *Ranney III v. Parawax Co*, 582 N.W.2d 152 (Iowa 1998) : Plaintiff "diagnosed" with Hodgkin's lymphoma in 1985. He suspected from the beginning that his cancer was caused by exposure to chemicals at work. His products liability action commenced to run in 1988 when he could reasonably be expected to know that the defendant caused his injury.

- *Estate of Montag v. T.H. Agric. & Nutrition Co.*, 509 N.W.2d 469 (Iowa 1993) : Plaintiff diagnosed with liposarcoma in 1979. The statute of limitation is deemed to commence to run as to his products liability claims in 1986 because that is when he was in possession of information that reasonably established that his exposure to Agent Orange cause his cancer.

- *Vachon v. State of Iowa*, 514 N.W.2d 442 (Iowa 1994) court rules that a claim does not accrue until plaintiff knows or in the exercise of reasonable care should know both the **fact of** the injury and its cause. Also see *Reiff v. Evans* 630 N.W.2d 278 (Iowa 2001)

- *LeBeau v. Dimig* 446 N.W.2d 800,802 (Iowa 1989) "A pure latent injury case arises in one of three situations: a suit by a worker who contracts an occupational disease; a medical malpractice suit by a patient who discovers an injury long after the negligent medical treatment has been administered, or a product liability suit by a consumer of a drug. . . or other medically related product who discovers a side effect from the use of the defendant's product. In each of the pure latent injury cases, the plaintiff fails to discover either the injury or its cause until long after the negligent act occurred."

- *Gates v. John Deer Ottumwa Works*, 587 N.W.2d 472 (Iowa 1998): Application of the discovery rule to the cases described in *LeBeau* is necessary to prevent the unfairness of charging a plaintiff with knowledge of facts which are inherently unknowable. "

Not one Iowa case supports the conclusion that inquiry notice commences the running of the statute of limitations in a purely latent injury case upon the plaintiff's inquiry into the fact of, or existence, of their injury. A host of cases, not the least of which is *Perkins*, say otherwise.

2. Iowa Code Section 614.1(2) and (9) , as applied, are unconstitutional vague, arbitrary and capricious. In order that citizens may protect their interests it is expected that laws which limit or eliminate those interests must be sufficiently precise such that they are subject to reasonable interpretation.

Given the cases cited above and given the express language of the statute of limitation at issue, it is impossible to determine just when the statute of limitations will commence as to medical malpractice claims and products claims against health care providers in cases seeking un-capped damages. The statutes commenced in the products cases described above long after diagnoses. The statutes commenced in workers compensation claims (capped claims) against health care industry defendants at the time of diagnosis. Yet, the Thompsons' claims for medical malpractice and products liability are deemed to commence prior to any diagnosis. In fact the District Court judge could not say with any degree of specificity the date on which the statute commenced. If he didn't know, then the date is subject to arbitrary and capricious determination by whomever is sitting in judgment. That is unconstitutionally vague and dangerously subject to the arbitrary and capricious whim of those sitting in judgment, rather than the people of the state of Iowa.

CONCLUSION:

WHEREFORE, by reason of the foregoing, Plaintiffs/Appellants/Petitioners respectfully pray and they mean "pray", that this honorable Court grant their Petition and agree to hear this matter.

Respectfully Submitted:

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(Any footnotes trail end of each document)

IN THE IOWA DISTRICT COURT FOR STORY COUNTY

Gretchen W. Thompson and Todd D. Thompson, both individually and for and on behalf of their minor children, Mareika L and Jake A. Thompson, minors.,
Plaintiffs

v.

ORDERS OF SUMMARY JUDGMENT

Mary Greeley Medical Center: Regent Medical division of SSL Americas, Inc.: Maxxim Medical Corp.; Ansell Health Care Products Inc., manufacturers, of latex gloves utilized by Mary Greeley Medical Center from 1991 through 1996, and McKesson General Medical Corp., Baxter Healthcare Corp., and Kreisers, Inc. distributors of latex gloves to Mary Greeley Medical Center during the period 1991 through 1996; the McFarland Clinic, P.C. , Dr. James Downard and Dr. Terry McGeeney
Defendants.

Filed February 25, 2002
Diane L. Tott, Clerk
Nevada, Iowa

The original petition was filed on August 30. 2000. The defendants were Mary Greeley Medical Center, the McFarland Clinic, P.C. Dr. James Downard, Dr. Terry McGeeney, and "unknown manufacturer(s)" and "unknown distributor" of latex gloves. Plaintiffs filed their first amended petition on September 11, 2000. It appears identical except for a

substitution of Iowa counsel. The named defendants were served September 2000.

On January 2, 2001, counsel for Mary Greeley in response to interrogatories, vie fax transmission, submitted to plaintiffs' counsel a list of manufacturers and distributors which had supplied and/or manufactured the gloves utilized by Mary Greeley for the years in question.

On January 11, 2001, the plaintiffs filed a motion for leave to file a second amended petition to name the other manufacturers and/or distributors of latex gloves to Mary Greeley Medical Center. This motion was granted by the court on January 17, 2001. Thereafter, plaintiffs sought service upon these newly added defendants.

Each and every defendant has moved for summary judgment. The bases of the summary judgments, though all involving a limitations issue, are somewhat different.

The two doctors, their clinic, and the hospital have filed a joint motion: Ansell Health Care Products has filed a separate motion for summary judgment, with Regent Medical, Baxter Healthcare, Maxxim Medical and Safeskin Scientific Corp. joining in that motion: McKesson and Kreisers have each filed a separate motion, with Kreisers asserting a separate defense of immunity as a distributor under Iowa Code section 613.18; and, lastly, Sage Products, Inc. joined with McFarland, but filed a separate motion alleging, as an undisputed fact, that it did not supply latex gloves to Mary Greeley until October 1996, and then only chemotherapy gloves. The plaintiffs have resisted all the motions, except Sage Products' independ3ent motion relating to its non-involvement at relevant times.

All the parties appeared for a contested hearing upon the collective motions and resistances, on Thursday, January 31, 2002, at the Boone County Courthouse.

Patricia J. Matassarin and Frederick W. James, appeared for the plaintiffs; Steven K. Scharnberg appeared for McFarland Clinic and Drs. Downard and McGeeney; Jason Palmer appeared for Mary Greeley; Richard A. Stefani represented Ansell Health Care Products; William J. Hunnicutt appeared for Maxxim; Donald G. Thompson and David Larmore represented Baxter Health Care; Teri A McMurtry-Chubb represented Kreisers; Katie Brown appears for McKesson General Medical; David H. Luginbill and Christy Benton represented Safeskin Scientific Corp.; and Stephen V. Nielsen appeared for Regent Medical. Roland D. Peddicord was on the motion and briefs for Sage Products.

Gretchen L. Watts (d/o/b/6-28-72) graduated from Ames High School in 1990. She attended ISU for one year, followed by another year at Indian Hills Community College in Ottumwa. She enrolled for additional class work at ISU and Des Moines Area Community College. At DMACC she engaged in paralegal studies and in pre-nursing for a semester. She now lives in Spencer, Iowa, with her husband and two children who each assert claims for spousal/parental consortium.

Gretchen, then 18, started working at Mary Greeley in May 1991 on a part-time basis. She was employed for four and a half years. She first work in the cafeteria serving food, operating the cash register, cleaning and wiping the tables (Dep. p. 12). while working in the cafeteria, she wore latex gloves when engaged in food preparation or its service (Dep. p. 14). Gretchen transferred to the business office in 1993,

essentially answering the telephone and doing paperwork. (Dep. p. 13)

Towards the end of her tenure in the cafeteria, the gloves started to bother her. Her hands would itch (Dep. p. 15). She reported this to her supervisor, who instructed her to use powder-free gloves. That did not seem to help, but she then transferred to the business office (Dep. pp. 15-16). Thereafter, she was ill quite often. When Gretchen walked into the hospital, she would start coughing uncontrollably. Gretchen was told she suffered from bronchitis. These problems were experienced in the fall of 1995 (Dep. p. 18). Though her health nurse had not release her to go back to work, due to the coughing and sneezing, her supervisor in the business office was upset that she was not at work. Gretchen left her employment at Mary Greeley voluntarily in October 1995 (Dep. p. 12).

Gretchen and Todd Thompson were married in February 1996 (Dep. p. 19). In March 1996, she started working for Ames Community School as a part-time custodian, through August 1996 (Dep. p. 20). She was told to wear Playtex/yellow dishwashing gloves, which extended up to the elbow. The first day she broke out into hives, red welts that itched (Dep. pp. 20-21). That was reported to her supervisor. Gretchen was told if the gloves bothered her she should discontinue wearing them (Dep. p. 22). Again she experienced bronchitis later that summer. After a coughing attack at work which cracked her rib, she obtained a work release and decided not to go back to the school (Dep. p. 23).

Gretchen's state of health deteriorated over the period of years that she worked at Mary Greeley Medical center. She suffered from headaches, malaise, fatigue, weakness, depression, anxiety, inability to concentrate, nausea and other

problems. In or around August, 1996, she began to experience significant and acute food allergies (petition par. 24). Gretchen was seen over 35 times from 1990-1998 at McFarland Clinic with a variety of symptoms, including vertigo, recurrent, unexplained tachycardia, recurrent rash, and a pregnancy (McKesson Exhibit A., report from plaintiff's causation expert). That same report states 17% of health care workers have an allergy to latex.

In the fall of 1996, Gretchen consulted with Drs. McGeeney and Downard, about the reactions she experienced after eating certain foods and wearing gloves (petition, par. 19-20). Latex allergy was not diagnosed by either. Gretchen contends that sufficient facts were given them by her that if they (Drs. McGeeney and Downard) "would have listened and paid attention," they should have diagnosed her with latex allergy (Dep. pp 30-33). Downard saw Gretchen for the first pre-natal check in November 1996(Dep. p. 34). Gretchen, in discussing her medical history, stated she was allergic to sulfa . . . "and I had a problem with gloves earlier that spring when I was working with the schools, . . . I seem to have this intolerance to fruits and vegetables." She said Dr. Downard said "it was probably hormonal." (Dep. p. 35). "I have also spoken with Dr. McGeeney about the fruit allergy . . . after I had spoken with Dr. Downard first . . . He though it was probably just because I was pregnant." (Dep. pp. 36-37).

Gretchen, in response to these consultations, states:

During the course of the treatment for my first pregnancy, September 196 through June 1997, at McFarland Clinic with Drs. Downard, McGeeney, Millerlieli and Cryan I was an employee working full time, or part time, or on leave of absence. I had been a patient of McFarland Clinic from the

time that I was six years old. At that time, I had the utmost faith in the type of treatment that I received and felt that because I was an employee that I was getting the best treatment available. The employees and the doctors were like family to me. During the entire time that I was being treated, no doctors or anyone else told me or suggested to me that the problems repeatedly experienced by me during the course of my pregnancy of inappropriate sinus tachycardia; bloody diarrhea, food intolerance's; lightheadedness, shortness of breath; cramping and nausea were related to, or caused by, anything other than the pregnancy. I continued to believe that any problems, especially food problems that I experienced were due to hormone changes associated with pregnancy and nursing until such time as I was told on August 31, 1998 by Dr. Gottlieb that I had a latex allergy and that the type of reactions that I had been having were anaphylactic reactions related to latex allergy ". (Gretchen W. Thompson's affidavit, p. 2 par. 4)

In the fall of 1996, Gretchen had started working fulltime with McFarland Clinic in records. She was pregnant and developed tachycardia. She was moved to the business office where she did not need to stand. Gretchen worked there until August 1997 when they moved to Illinois. In December 1997, they were transferred to Greenwood, South Carolina, where they lived until October 1999 (Dep. 27).

While in South Carolina, Gretchen consulted an obstetrician, Dr. Carter, on August 6, 1998 (Exhibit C, McFarland motion for summary judgment). He confirmed her pregnancy. Carter's records bear a handwritten note "LATEX ALLERGY' (McF Exhibit C). Gretchen, when deposed, stated, as follows, about that office call:

" His nurse when we were going over my medical history specifically asked about food allergies and latex allergy, if I had a problem with gloves or rubber band, things like that, things of that nature. And I had said that yes, on a couple occasions I had a problem and that I had this ongoing fruit allergy which was thought to be pregnancy or hormonally related. So he cam into the room and we discussed it and he referred me to Dr. Gottlieb. (Dep. p. 79). We talked about my previous pregnancy, that I had this inappropriate sinus tachycardia. And then, like I said, his nurse had mentioned - had asked me about the allergy to gloves or food allergies, and I had said I have this intolerance for fruits and vegetables. And so he came in, he said, well, it sound like it might be a latex allergy but he told me it was rare. And that he assured me I didn't have it but just to be on the safe side I should go see an allergist. (Dep. p. 80). Dr. Carter's nurse had mentioned if I had a latex allergy, and I said I didn't know what that was. She asked about the gloves." (Dep. p. 85).

Dr. Carter, in 2001, in a memo prepared in response to a request from Gretchen's lawyer, reflected that after a review of his records "she (Gretchen) had mentioned that she may be allergic to latex. For this reason, I went ahead and ordered the workup with Dr. Gottlieb." (McF Exhibit C. McFarland's motion for summary judgment).

Gretchen, by her affidavit, p. 1 par. 2 states:

"When I first presented for treatment to Dr. Carter in Greenwood, South Carolina on August 6, 21998 I did not tell his intake nurse that I had, or suspected that I had, a latex allergy. Dr. Carter's nurse, during the course of obtaining intake information from me, asked if I had had any problems with latex gloves or rubber bands. I indicated that I had experienced a rash after using gloves when I worked at a

hospital in Ames, Iowa in the cafeteria and again when I worked as a custodian. She then told me that I might have a "latex allergy" and conveyed that information to Dr. Carter. She also asked me whether I had problems with certain foods."

Gretchen saw the allergist, Dr. Gottlieb, on August 11, 1998. Gottlieb's notes are set forth as Exhibit D. of McFarland's motion for summary judgment. C/C (chief complaint) was "latex allergy, food." His notes show "reactions to fruits, vegetables. #1 banana: since has reacted to avocado, kiwi, potato, cantaloupe, tomatoes, peanuts/nuts." Gottlieb's impressions were "Latex Allergy, FoodAllergy, Pregnancy." Gottlieb's plan. "Latex RAST, Latex Avoidance, EpiPen, Food Avoidance, Will test foods in future. Gave Canadian Allergy Society Guidelines."

Gretchen submitted to the RAST (radioallergosorbent test) on August 12, 1998. The laboratory report shows it was reported to Gottlieb on 8-14-98 (McF Exhibit F) Gottlieb's notes how "8-18-98 notified pt. of positive Latex RAST results." An affidavit of Vicki Brooks, attached to McFarlan'd motion, verifies that Brooks initialed (vsb) that note, entered by her in Dr. Gottlieb's medical chart, which substantiates that she notified Gretchen of the positive latex RAST results by telephone on 8-18-98.

Gretchen attests, in her affidavit, that she did not receive that verbal message in regard to the RAST results; that she was never told she had a latex allergy until she saw Dr. Gottlieb on August 31, 1998, when she was told of the RAST results and she had a latex allergy. (Gretchen Thompson affidavit dates 11-2-01, pp. 1-2. par.3). In her deposition, she stated "she might have" received that call (p. 92) and "they could very well have" called (p. 95).

Gretchen's deposition, concerning the 8-11-98 office visit was as follows (p. 82, 1.2 to p. 91,1.8):

Q. Okay, What did you tell him about your work history?
A. Well, he asked if I'd ever worked in a hospital or clinical environment and-because it's more prevalent in health care workers. And I said, well, I wasn't a health care worker, but I worked in the cafeteria at the hospital where we wore gloves.
Q. And I realize it's been a long time but as best you can try to tell us what you said to him and what he said to you. Do you recall anything else about your employment, where you had worked. what was said?
A. No. I just said that I worked at the hospital and I had worked at the clinic. But the only time I was in contact that I actually wore gloves was at the hospital. And then I had had a breakout when I worked at the schools.
Q. You said you also talked to him about the allergies that you had had to food. As best you can recall tell us what you told him at the time.
A. It was towards the end of the-I wasn't- I didn't know that the two were related. And so we talked about this glove allergy or the problems. He asked what kind of reaction I had. Did I ever have, you know, shortness of breath or problems, you know, with runny nose.
Q. How did you respond to those questions?
A. Shortness of breath, no. I don't have a problem with shortness of breath if I'm -or I hadn't at that point in time when I just came in contact with something. I would have a -breakout into rash or hives or have itching. And that's about it.
Q. Did you discuss particular foods?
A. Bananas in particular. By then I had- by this process of elimination, bananas I knew. Avocados I knew. Kiwi I knew.

And tomatoes, I though maybe I was allergic to tomatoes.
And carrots, I though maybe I was allergic to carrots.
Q. Did he ask you which particular foods caused problems?
A. Yeah. And that was my response.
Q. That was your response. Did he say anything to you about what that meant?
A. No. He had said that in some cases of people with latex allergy they can go ahead and cross-react to certain fruits and vegetables. That it's not a very common thing. It's pretty rare so he didn't - and like I said we had discussed the fact that I was pregnant and that my previous doctors had said that it was just from me being pregnant.

And up until the time I became pregnant with my son I was nursing my daughter. So the same hormones are still in me so I just - I said it was - I just mentioned it to him. It wasn't - it was just kind of a thing in passing and it, you know, sparked a conversation about what fruits I was having problems with.
Q. When I asked you to tell us about your visit with Dr. Gottlieb on August 11, 1998, I think you said we talked about my problems, my work experience and allergies to food. I think we've covered your allergies-to-food discussion and your employment discussion with Dr. Gottlieb?
A. Uh-huh. (Witness indicated affirmatively).
Q. Yes?
A. Yes.
Q. And then tell us about your discussion of your problems that you were having at that point.
A. That's what I'm referring to. Just my- this food allergy which I just - I couldn't figure out why things I've eaten all of my life for some reason now I can't even be around them.
Q. His note at the top, by that I mean his August 11, 1998 notes has for chief complaint: Latex allergy, food. Was that something that you had told him your complaints were?
A. No. I didn't know what a latex - I had never heard of a latex allergy.

Q. Well, hadn't you first heard of it when you were with-
A. Right. Well, yeah. Dr. Carter's nurse had mentioned if I had a latex allergy, and I said I didn't know what that was. She asked about the gloves.
Q. I think his note states 26 year old white female with allergic rhinitis presents with two year history contact urticarie within two minutes of wearing rubber gloves, lasts three to four hours. Some angioedema. No generalized - I'm not sure of that word - pruritus. Is there anything in that statement that is inconsistent with your recollection?
A. I'm not sure what those words even mean.
Q. All right.
A. The contact dermatitis. I know what that is. But the other one I don't .
Q. Says at four months later started having reactions to fruits and vegetables. No. 1 was bananas. Since has reacted to avocados, kiwi, potatoes, cantaloupe, tomatoes, peanuts and nuts. Is that consistent with -
A. Probably about what I told him.
Q. It indicates that when you had these symptoms you took Benadryl?
A. Yes.
Q. Is that correct?
A. Yes.
Q. But you did not go to the emergency room?
A. Correct.
Q. Says hasn't had problems with dental exam, pelvics or rubber bands; is that correct?
A. Correct.
Q. Did Dr. Gottlieb do any testing while you were there?
A. Not while I was in his office. He sent me to the hospital to have my blood drawn.
Q. Before he sent you to the hospital did he tell you what he thought? What he thinking was?

A. He wasn't sure if I had a latex allergy or not. He'd never had a patient with latex allergy before. So he said typically, you know, in his knowledge it was usually health care workers who worked for, you know, 20 or 30 years wearing gloves or whatnot. So he didn't now but he was going to go ahead and do some blood work to find out for sure.
Q. Did you ask hi or did he tell you about what a latex allergy is?
A/ At that point in time, no.
Q. You didn't ask any questions?
A. I have seasonal allergies and I'm allergic to like sulfa. Latex allergy, I didn't know what that - I guess I didn't really think of it as a real big deal at that point in time. I hadn't heard the term before. And so when he said there's a possibility you might have latex allergy, I'm thinking so I'm allergic to gloves. That's you know, not a big deal.
Q. You knew generally what latex is?
A. I knew it was in gloves, I did not realize that everything it - that has it.
Q. And you knew what allergy meant?
A. Yes.
Q. Because you'd had some other allergies?
A. Right.
Q. So you had an idea of what he was talking about when he said you might have a latex allergy?
A. The possibility that I'd get a rash if I was in contact with gloves or-
Q. Did he say anything else to you that you can recall about your condition before he sent you to get a test?
A. No. He showed me what an Epi-pen looked like.
Q. And what did he tell you an Epi-pen was?
A. For an anaphylactic reaction.
Q. For a latex allergy?
A. Yes.

Q. Why did he show you the Epi-pen?
A. The room we were in, he was sitting at a desk and he just opened up the desk drawer and showed me what an Epi-pen looked like.
Q. Was it something in the context of some people that have latex allergies have anaphylactic reactions and have to use these Epi-pens?
A. Epi-pens. right. Yes.
Q. Did he show you how it was used?
A. No. He just showed me what it looked like.
Q. Did he tell you what his impression was at that time?
A. No. He didn't know if I had a latex allergy or if I had just had a fruit allergy of if it was just a hormonal thing because I had been pregnant and then nursed and then gotten pregnant again.
Q. His records indicate latex allergy, food allergy, pregnancy. All of those things would have been discussed at that visit?
A. Correct.
Q. Did he tell you to do anything besides go have this blood test?
A. Stay away from the fruits that I thought that I was maybe allergic to or intolerant of. And then go have the test done.
Q. Did he tell you t avoid latex?
A. Until I got the test results back he said - but I said it wasn't a problem. I was not working. I was staying at home and - with a one-year-old. I didn't-
Q. Did he tell you that there was latex products in your home?
A. Not at that visit. no. At my second visit he did.
Q. But he did tell you to avoid those foods and to avoid latex?
A. Right. Which I though was gloves.
Q. Anything else you can remember him telling you>
A. No. He said that I'd go and have the blood work done. It would be sent o John Hopkins. It would take a couple weeks

to get the results back. And depending on what the results said, we would go ahead and take it from there.
Q. Did he give you any written materials at that time?
A. Not that I remember, no.
Q. Because his record of August 11, 1998, under the plan states: Latex RAST, which was the test: right?
A. Yes.
Q. Latex avoidance, Epi-pen. food avoidance, will test foods in future post-partum after you've had your baby?
A. Correct.
Q. Did you discuss that?
A. A little bit. More the second visit than the first.
Q. Then it says gave Canadian Allergy Society Guidelines. Do you remember those guidelines?
A. I do not remember receiving anything. He did give me some printouts on my second visit. I don't remember receiving anything on my first visit.
Q. But you know that those Canadian Allergy Society Guidelines relate to latex allergies?
A. No. I don't know what they pertain to.
Q. At this point do you have any recollection of those guidelines?
A. No. None."

Later in her deposition (p. 98) Gretchen agreed that she may have been givin it. It is a 25 page document that describes latex allergy, its background, reactions, risk groups, and reasons; avoidance issues, high risk groups, prevention and management, treatments, allergy questionnaires, and exhaustive list of articles and references (AHP Exhibit E).

Gretchen started having problems with tachycardia and was sent to Dr. Prichard a cardiologist. She was sent to the hospital to have the heart monitors placed on her. She asked if the electrodes had latex on them. Gretchen was assured there

was not, but she got a reaction (Dep. p. 91). This occurred on August 24, 1998 (p. 16 of resistance of McFarland motion) She called Dr. Gottlieb about the heart monitor (Dep. p. 92).

Gretchen saw Dr. Gottlieb the second time on August 31, 1998. He personally notified her of the positive latex RAST result (Dep.p. 92). His notes (AHP Exhibit D) reflect the latex electrode incident which caused "dizziness, lightheadedness, itching, contact uticarie" (Dep. P. 155). Dr. Gottlieb told Gretchen to avoid latex gloves (AHP Exhibit D: Dep. P. 156) on August 11, 1998, office visit.

Gretchen started researching on her computer in October 1998 about latex allergies (Dep. p. 113). Dr. Gottlieb was unable to complete the food testing until her son was delivered on March 8, 1999 (Exhibit E) in a latex-free environment (Thompson Affidavit. p. 2. par. 6). She was unaware of any lawsuits until she read about a Minnesota case on the internet in September 1999 (Thompson Affidavit p. 2. par. 5). Gretchen contacted a lawyer in the fall of 1999 (Dep. p. 129)

STATUE OF LIMITATIONS

There are two different statues of limitations involved in these collective motions.

In Iowa, medical malpractice actions against physicians and hospitals must be brought within two years after the date on which the plaintiff knew, or through the use or reasonable diligence should have known **of the existence of the injury for which damages are sought.** Iowa Code section 614.1(9). The statute governing the actions against manufacturers and distributions is Iowa Code section 614.1(2): **those founded on injuries to the person, whether based on contract or tort, within two years.**

The defendants have the burden to prove the limitations defense; but Thompson has the burden to establish any exception to the ordinary limitations period, such as the applicability of the discovery rule. Sparks v. Metalcraft, Inc., 408 N.W.2d 347,359 (Iowa 1987).

For openers, summary judgment is proper when there is no genuine issue of fact and the moving parties are entitled to judgment as a matter of law. The burden of showing the nonexistence of a material fact is upon the moving parties. While an adverse party generally cannot rest upon her pleadings, summary judgment is till not proper if reasonable minds could draw different inferences and conclusions from the undisputed facts. Summary judgment is functionally akin to a directed verdict; every legitimate inference that reasonably can be deduced from the evidence should be afforded the non-moving party and a fact question is generated if reasonable minds can differ on how the issues should be resolved. *Knapp v. Simmons,* 345 N.W.2d 118,121 (Iowa 1984). However, where the evidence compels only one reasonable conclusion, the question presented is one of law. *Swartzendruber v. Schimmel,* 613 N.W.2d 646,649 (Iowa 2000) .

Since Gretchen W. Thompson and her family, are the parties resisting the summary judgment, evidence is viewed in the light most favorable to them. The summary judgment record in this case contains the pleadings, affidavits, portions of depositions, and exhibits.

In a discovery rule, the statute of limitations begins to run when the injured persons discovers or in the exercise of reasonable care should have discovered the alleged wrongful act. Schrischilles v. Griswold, 150 N.W.2d 94,100 (Iowa 1967). Iowa adopted the discovery rule in Chrischilles: "The question in any case is not. What did the plaintiff know of the

injury don her? but, What should she have know, by the means of information within her reach. the vigilance which the law requires of her?" *Id.* The rule is based on the theory that a statute of limitations should not bar the remedy of a person who has been excusably unaware of the existence of the cause of action. *Flynn v. Lucas County Memorial Hospital*, 203 N.W.2d 613,616 (Iowa 1973)

This means that the statute of limitations does not begin to run until the injured person has actual or imputed knowledge of all the elements of the action. Franzen v. Deer, 377 N.S.2d 660,662 (Iowa 1985). It is sufficient that the facts would support a cause of action. It is not necessary that a person know they are actionable. Knowledge of the facts and knowledge they are actionable are distinct and unrelated issued for the purposes of the discovery rule. Id. There is no suggestion in any of the leading cases in this area that accrual of the cause of action is postponed until the plaintiff learns or should learn the state eof the law positing a right of recovery upon the facts already known to or reasonably knowable by the plaintiff. Id.

The period begins at the time the person is on inquiry notice. Limitations begin to run when a claimant gains knowledge sufficient to put the claimant on inquiry. As of that date, the claimant is charged with knowledge of facts that would have been disclosed by a reasonably diligent investigation. The beginning of the limitations period is not postponed until the end of an additional period deemed reasonable for making the investigation. *Franzen v. Deere*, supra. Moreover, once a person is aware a problem exists, she has a duty to investigate even though she may not have exact knowledge eof the nature of the problem that caused the injury. *Sparks*, at p. 351.

The duty to investigate does not depend on exact knowledge of the nature of the problem that caused the injury. It is sufficient that the person be aware that a problem existed. One purpose of inquiry is to ascertain its exact nature. Franzen v. Deere, supra.

The Court first considers Gretchen's contention her claims were timely filed. The discovery rule protects plaintiffs who were unaware of the accrual of a claim and could not have been aware of it in the exercise of reasonable diligence. *Roth v. G.D. Searle &Co.*, 27 F.3d 1303,1307 (8h Cir. applying Iowa law). The Iowa law recognized the discovery rule for product liability actions brought by consumers. *Wilber v. Owens-Corning Fiberglass Corp.*, 476 N.W.2d 74,75 (Iowa 1991) The rule applies in certain cases to prevent the unfairness which would result from assuming a plaintiff was aware of facts which were "unknown and inherently unknowable." *LeBeau v. Dimig,* 446 N.W.2d 800,802 (Iowa 1987).

The relevant question is when Gretchen knew or should have know of her allergies and their possible connection to her previous exposure to latex. On that date, she is charged with knowledge of facts that would have been disclosed by a reasonable diligent investigation. *Sparks*. at p. 351.

Gretchen requests that the Court be cognizant of the distinction between cases involving trauma and one where it is a "pure latent" injury case. LeBeau v. Dimig, supra. discusses the two groups of late-discovered injury. It describes the "pure latent" - as:

" One which arises in one of three situations: a suit by a workers who contracts an occupational disease,

> a medical malpractice suit by a patient who discovers an injury long after the negligent medical treatment has been administered, or a product liability suit by a consumer of a drug or product. In each of the pure latent injury cases the plaintiff fails to discover either the injury or its cause until long after the negligent act occurred."

The second type of case is a "traumatic event/latent manifestation," which is one in which the plaintiff has sustained both immediate and latent injuries caused by a noticeable, traumatic occurrence. In these situations, the plaintiff realizes the traumatic event; that is, she is injured and how is responsible, but the full extent of the harm does not become manifested. An example is where minor injuries are involved in a vehicle collision and chronic pancreatitis later develops, allegedly caused by the accident. See Caudill v. Arnett, 481 S.W.2d 668,669 (Ky. App. 1972), cited in *LeBeau.*

the application for the discovery rule is approved in "pure latent" case, but disapproved in "traumatic event/latent manifestation" cases as it would involve splitting the causes of action and providing separate statutes of limitation for successive injuries caused by the same event. *LeBeau*, at p. 802.

The toxic tort cases are particularly helpful at latent injuries. In Sparks, supra, Sparks was employed in 1964-1980 using solvents manufactured by Metalcraft. In 1973, he complained of fever, chilling and severe headaches. He visited a doctor and took a can of the solvent with him. He did the some thin in 1977. In the fall of 1980, Sparks consulted a physician. The doctor wrote a lengthy report that his symptoms appeared related to sparks' sixteen-year exposure to the solvent. Sparks

filed hi lawsuit in January, 1985. Metalcraft moved for summary judgment. Sparks resisted relying on affidavits that averred that while solvents were suspected, he did not obtain a definitive diagnosis until 1984. The district found, as a matter of law, that the actions were barred by the statute of limitations.

In Estate of Montag v. T.H. Agriculture & Nutrition Company, 509 N.W.2d 469 (Iowa 1993) Montag was employed in 196-64 by a company engaged in eliminating brush along county roadways by using the herbicide 2-4D and agent orange. In 1979 Montage was diagnosed with soft tissue cancer and began treatment. In 19867, Montag became aware of health concerns about agent orange. He inquired from his doctor if there might be a connection between it and his liposarcoma. The doctor said that he was unaware of any association, that "it could be looked into further." Suit was initiated in 1991. The court extended the time for suit under our delayed discovery rule, but concluded that the period of limitations began to run in 1986 as Montag had already begun his investigation. Montag had sufficient information in 1986 to put him on notice that he should investigate. Summary Judgment was appropriate.

The Montag court summarized the discovery rule succinctly at p. 470:

> " Under our cases, the statute of limitations begins to run when plaintiff first becomes aware of facts which would prompt a reasonably prudent person to begin seeking information as to the problem and its cause. In that case , the period of limitations is the outer limit for making the investigation and bringing the action. The period begins at the time the person is on inquiry notice. (emphasis added)

Franzen, Sparks, and Montag all relied on a New Jersey case, Burd v. New Jersey Telephone Co., 386 A.2d 1310,1314 (N.J. 1978). Burd sustained a heart attack while working a trench gluing plastic pope. He experienced dizziness, lightheadedness, and personality changes before the heart attack. These symptoms cleared up within an hour or so after he left work. A caution lable on the glue advised the user to "avoid inhaling fumes." This information was available to him in 1971, but he did not file suit until 1974. Burd contended the statute did not being to run until October 1972 when his attorney received a medical report indicating a reasonable likelihood of a link between the glue and the heart attack. The New Jersey court stated at p. 3145 (cited in *Montag*)

> "There is no suggestion in any of the leading cases in this area that accrual of the cause of action is post-poned until the plaintiff learns or should learn of the state of the law positing a right of recovery upon the facts already known to or reasonably knowable by the plaintiff . . . When the reported decisions speak in terms of the 'discovery of the existence of the cause of action . . . the intended meaning is precisely what we have just articulated . . . i.e., the cause of action occurs when the injured party discovers that he may have a basis for an actionable claim. The basis mentioned is, of course, constituted solely by the material facts of the case."

Another latent injury case is Vachon v. State, 514 N.W.d 442 (Iowa 1994). This was a state tort claim. The court found that Iowa Code section 669.13 was the applicable limitation section rather than section 614.1(9). It held that the discovery rules apply to claims brought under chapter 669. It discussed the necessity of applying the discovery rule in medical malpractice cases due to the latent nature of injuries common

in medical malpractice. Vachon was truck by a car in 1987. He was diagnosed as having "compartment syndrome" in his right leg. After several days treatment, his surgeons at the University of Iowa amputated hi leg on October 126, 1987. On may 15, 1988 Vachon retained legal counsel. After requests by the attorney, Vachon's medical records from the University of Iowa Hospital were mailed to Vachon's attorneys on March 17, 1989. On August 25, 19889 Vachon sued the original treating hospital and doctors for failing to diagnose the compartment syndrome. During discovery on t May 7, 1989, Vachon's attorney received a physician's letter. It indicated that the orthopedic resident at the University of Iowa Hospital missed the diagnosis in the emergency room and it was not confirmed until the arrival in the operating room. A jury found for the defendants in November 1990. This suit was initiated on July 8, 1991. Vachon argued, in response to a motion for summary judgment, that a genuine issue of material fact existed; that he possessed no knowledge of a potential cause of action against the State until the May 7, 1990 letter; and that he had no factual basis for lawsuit until that point. Vachon contended that the newly discovered information was necessary for him to be aware of the delay between the treatment given in the emergency room and the discovery and treatment of the compartment syndrome injury in the operating room. However, our court stated that Vachon and his counsel knew that the injury was a compartment syndrome injury; and medical records were mailed to Vachon's attorneys on March 27, 1999, and presumably received. "By that time, if not before, the plaintiffs knew all the facts needed to investigate and determine the existence of a cause of action against these defendants in the case at bar." It stated:

> "Moreover, it is unnecessary that the plaintiff know of the specific negligence of a particular defendant or the details of the evidence by which to prove the cause of

action. The statute of limitations begins to run if a plaintiff may reasonably be charged with knowledge of facts sufficient to trigger awareness of a cause of action against a particular defendant."

Baines v. Blenderman, 223 N.W.2d 199 (Iowa 1970), is a medical malpractice case. It must be read with some reservation as it was before enactment of 614.1(9). Dr. Blenderman performed surgery on Baines on March 30, 1970, to repair a herniated disk. Baines lost vision in his right eye, which he reported to his physicians. They told him that these things happened and "it would come around." The loss of vision persisted. Baines asked a Dr. Brown (not a defendant) on a couple of occasions what was wrong and was given the same response. Baines consulted with an eye specialist on July 15, 1970, and was told his vision loss could have been caused by the blood supply being cut off during surgery. The action was commenced on May 13, 1972. Our court implemented the discovery rule. Although Baines' new condition must have been caused by something that occurred during surgery, he was repeatedly assured that it was a temporary post-operative side effect, which he had a right to rely on. The court found that under the record the fact the plaintiff knew he had an injury which was caused during surgery is insufficient to charge him with knowledge it was caused by the defendant's malpractice. The court found that there was a genuine issue of material fact sufficient to submit whether or not the defendants have established their statute of limitation defense to the trier of fact. *Baines* was before the enactment of section 614.1(9), in fact, the genesis of it.

Woodroffe v. Hasenclever, 540 N.W.2d 45,47 (Iowa 1995), is a repressed memory syndrome case related to sexual assault when the plaintiff was a minor. The court affirmed a summary

judgment granted the defendant. It concluded that the notes of a physiologist, who was seen by the plaintiff seven years prior to the initiation of the action, reflected that she had specific recollections of the abuse sufficiently to put her on inquiry notice. The court concluded that from the statements both the sexual assaults and their relationship to her physchological problems were known to her. The court approved the trial court's conclusion that this information could only have come from the plaintiff because this was her first appointment and any entries had to be entirely based upon statements made by the plaintiff.

Borchard v. Anderson, 542 N.W.2d 247 (Iowa 1996), is a traumatic injury/latent manifestation case, but some of its principles still apply. The parties were married in 1996. Several acts of severs domestic abuse occurred during their marriage. They were divorced in 1981. However, the wife's emotional trauma continued. In 1993, she was diagnosed as suffering from post-traumatic stress disorder caused by the domestic abuse. The suit was started soon after. The trial court sustained a motion for summary judgment by the defendant which was affirmed by the appellate court. The court said that the first prong (discovery of the domestic abuse) was satisfied as the ex-wife was well aware of the physical abuse as it occurred. On the second prong (the nexus between the abuse and the claimed injury), the court found that the application of the discovery rule did not extend the statute of limitations for the reason that she was aware of the domestic abuse was inappropriate and that it caused her harm; though she may not have known medically why and how this abuse had and still did affect her, the law does not require such knowledge; "the law only requires hat she be aware of the existence of a problem." *Borchard v. Anderson,* supra., pg. 251.

Langner v. Simpson, 533 N.W.2d 511 (Iowa 1995) is a medical malpractice case, with specific discussion of the history of Iowa Code section 614.1(9). It discusses the advent of the discovery rule in personal injury claims arising in Chrischilles in 1967. Baines followed in 1974, when Iowa Code section 614.1(2) still governed malpractice. Baines held that section 614.1(2) begins the running of medical malpractice cases when the injured persons knows or can be charged with knowledge of the existence of a cause of action. Within one year after Baines, the legislature passed subsection 9, the specific statute of limitations for medical malpractice. It restricts the discovery rule and starts the statute of limitations when the patient knew, or through the use of reasonable diligence should have know, of the injury for which damages are sought. The statute begins to run even though the patient does not know the physician had negligently caused the injury. *Koppes v. Pearson*, 384 N.W. 2d 381 (Iowa 1986). The court said at p. 518 from *Langner*.:

> "Although subsection 9 limits the discovery rule, what we have said in applying the rule still has validity. For example, the statute begins to run when a person gains knowledge sufficient to put the person on inquiry. On, that date, the person is charged with knowledge of facts that would have been disclosed by a reasonably diligent investigation. Moreover, once a person is aware that the problem exists, the person has a duty to investigate even though the person may not have knowledge of the nature of the problem that caused the injury."

The Langner court found that though the plaintiff did not know medically why and how statements made by the psychiatrist affected her, the law does not require such knowledge, only that she be aware that the problem exists. She knew the statements were inappropriate when they were a

made, and the fact a therapist did not tie it to her post-traumatic stress disorder until three years later did not justify the application of the discovery rule.

* * *

It is clear to this Court that the causes of action against Mary Greeley, McFarland Clinic and Drs. Downard and McGeeney accrued in August 1998, and more than two years prior to August 30, 2000. Whether it be on August 6, 1998; August 11, 1998; August 18, 1998; or august 24, 1998., in any event, it was before August 30, 1998. The same is true for the remaining defendants, though subsections 2 and 9 are different.

Arguably, the clock may have started way back in 1996 when she had earlier experienced the problems with the latex gloves, had uncontrollable coughing spells, and immediately broke out in hives from wearing dishwashing gloves. In the summer of 1996, she experienced a coughing attack which cracked a rib and was experiencing significant food allergies. She was able to articulate sufficiently of her past history which she now contends that Drs. McGeeney and Downard were negligent, in response thereto, by not diagnosing her latex allergy. However, the Court will allow the discovery rule to delay the inquiry notice to investigate the nexus between the exposure to latex and the allergy, but only to early August, 1998.

On August 6, 1998, her obstetrician wrote in large, capital letters in her medical chart, "LATEX ALLERGY". In her affidavit, she states that she related to him (or his nurse) experiences with a rash after using gloves while working in the Mary Greeley cafeteria and again as a custodian. Dr. Carter states that Gretchen mentioned that "she may be allergic to latex." By reason of that, he directed her to see the allergist

Dr. Gottlieb. And, in her deposition, Gretchen states that when Dr. Carter came in to the examination room he indicated "it sounds like it might [be] a latex allergy." True, it was not definitely diagnosed at that very time, but it does not need to be. Ad nauseum, the period begins when the person is on inquiry notice, and once a person is aware a problem exists, she had the duty to investigate it, and she is charged with the imputation of such knowledge reasonably discoverable by that investigation. *Sparks and Franzen.*

With the aid of her doctor, she was referred to the allergist on August 11, 1998. She submitted to the RAST test which proved to be positive. Dr. Gottlieb told her to avoid latex. His note at the top of his medical records as c/c (chief complaint) "latex allergy, food." Gretchen had heard of latex allergy from Dr. Carter and his nurse, just five days before. That was the reason she was having this test. Gretchen states that Gottlieb said he did not know whether it was latex allergy or not, but he was going to do some blood work to find out for sure. (Thompson dep. pp 86-87).

In *Montag*, Montag was not aware of the nexus between agent orange and liposarcoma for several years past his original diagnosis with cancer. It was when he became aware of health concerns about agent orange and inquired from a doctor (who was unaware of any link) that the court said the statute began to run, as he had begun his investigation. Gretchen had begun her investigation after Dr. Carter had said it sounded like a latex allergy. She did so by agreeing to see Dr. Gottlieb and obtaining a RAST test. She got on the internet. She helped provide a latex free environment for her delivery. The discovery rule is not extended during the period of investigation. Two years is allowed for investigation. But she had started on her investigation, by confirming the latex allergy

by a RAST test. The period of limitations it the outer time limit for making the investigation and bringing the action. But it still begins when she is placed on inquiry notice and knows of a problem. *Montag* at p. 470

Gretchen cites the Court to Swartzendruber, supra and Ranney v. Parawax co, 582 N.W.2d 152 (Iowa 1998). But the statue of limitations under chapter 85 is interpreted to mean that the injury occurs when it is discovered; i.e. when the employee discovers, or in the exercise of reasonable diligence should discover, the (1) nature, (2) seriousness and (3) probably compensible character of his injury or disease. Ranney, at p. 154. That is, whether ha had imputed knowledge of the probably compensible nature of his disease that . was caused by his workplace exposure to toxic chemicals. True, inquiry notice is also an issue in workers compensation, and some of the same cases are cited. But (2) and (3) are novel to workers compensation. Ranney was barred by the statute, and like Gretchen does in the present situation, Ranney requested that the beginning of the limitations period be postponed until the successful completion of his investigation. But as the Ranney court stated, that would be contrary to Montag and Franzen. Again, it is the time when the claimant is place on inquiry. Ranney, held at p. 155.:

> "Under Iowa law, actual knowledge of a causal relationship is not required to being the running of the statute of limitations . . . Thus the duty to investigate does not depend on exact knowledge of the nature of the problem that caused the injury. Once a person is aware of a problem she has the duty to investigate. It is sufficient that a person be aware a problem existed. the purpose of the investigation is to ascertain the exact nature of the problem that caused the injury. "

That inquiry notice was there on August 6, 1998. Gretchen heard her treating physician expound "it sounds like it might be a latex allergy," and referred her to an allergist to confirm it. She knew about her previous use of latex on that date and her reaction. She knew about her allergies, not only hives, itching and rhinitis, but also her violent reactions to certain foods. On that date, she was aware that she had used latex gloves at Mary Greeley and that Drs. Downard and McGeeney had told her, contrary to Carter, that it was hormonal. And she also knew that the latex gloves were manufactured and distributed by someone other than the physicians and hospital. She was on inquiry, and she started her investigation. Arguably, that date could be August 11, 1998 when she first saw Dr. Gottlieb. And maybe on August 24, 2998 (0r 28) 1998, when she was enough attuned to latex products and her problem that she inquired of the health care professionals whether the heart monitors contained latex, and then had an anaphylactic reaction which fact she conveyed that date to Dr. Gottlieb (who two weeks earlier had instructed her to avoid latex).

Gretchen denied learning of the positive result of the RAST test from Dr. Gottlieb's nurse, although she equivocates. She denies receiving the Canadian latex literature, and again she equivocates. She does state that she called Gottlieb when she sustained a reaction to the heart monitor. It would appear unusual that test result, which the lab report shows had been received by Gottlieb by that time, was not aired. And the burden for the application of the discovery rule remains upon Gretchen.

Rather, the discovery rules does not require that she absolutely know that she absolutely had a latex allergy. In argument, she sets forth a deposition of Dr. Brown, a McFarland allergist, that the RAST test does not mean to much

anyway without some clinical findings (there was those clinical finds from the heart monitor by Gottlieb) But she knew enough to put her on inquiry.

Gretchen's attorney, in argument, states that the limitations period did not start until September, 1999, when Gretchen found out about a Minnesota case that allowed recovery for latex allergy. But this is completely ignoring the "sufficient knowledge to place on inquiry" issue. That is the heart and soul of the discovery rule, whether it be against the medical professionals or the manufacturers/distributors. Neither the plaintiffs, Montag, Sparks, Burd or Bachon, knew the nexus of their injury until well after the time their investigation limitation period began. The courts started the clock when they each had inquiry notice.

It is important to note that subsection 2 and subsection 9 are different. Though cases generalize and may not always make that distinction, it is particularly important here since we have medical defendants, and manufacturers/distributors, who are under different limitations.

It is significant that Iowa Code section 614.1(2) reads as follows:

614.1 Actions may be brought with the time herein limited respectively. after their causes accrue, and not afterwards, except when otherwise specifically declared: (emphasis supplied)

2. Injuries to person or reputation - relative rights -statute penalty. Those founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, within two years.

The cases involving medical malpractice are "otherwise specifically declared." Iowa Code section 614.1(9) provides that the lawsuit must be filed "within two years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of, the injury or death for which damages are sought in the action, whichever of the dates occurs first . . . " That section was enacted in 1975 after *Baines*. The cases that state that plaintiffs must know or in the exercise of reasonable care should have known that she had a cause of action are really not applicable to the medical malpractice part of this lawsuit. But having said that, the cases are very clear that the limitations period is not stayed until the end of an additional period for making the investigation. It is sufficient that a person be aware that a problem existed. *Franzen*.

More cases can be cited. More distinctions can be made. In looking at the undisputed facts, in the light most favorable to the plaintiffs, those facts compel only one reasonable conclusion; that the limitation periods set forth in Iowa Code section 614.1(2) and 614.1(9) had each expired before August 30, 2000, and that the defendants, and each of them are entitled to summary judgment as a matter of law. Wile fairness to the plaintiffs provides justification for the discovery rule, the Court believes fairness to the defendants must temper the application of the rule. The reasonable expectations of the defendants as to when exposure to liability will be terminated, which lie at the heart of the statute of limitations, would be seriously eroded if this Court were to adopt the plaintiffs' theory. Se Woodroffe v. Hasenclever, supra. at p. 49.

Todd Thompson's claim is also time barred. Gretchen's children' consortium claims are also time barred, as joinder with their parent is required, unless that joined is not feasible.

There has been no evidence to show that joinder is not feasible, and the same statutes would be applicable for determining the limitation period.

* * *

RELATION BACK

There is the additional issue of the fact that the manufacturers/distributors' amended petition and service did not occur until some time later in January 2001. This was after the two-year statute of limitations had expired, even if the date was August 31, 2000, as the plaintiffs contend. Consequently, Gretchen's claim is barred unless she can satisfy the "relationback" requirements of Iowa Rule of Civil Procedure 69(e) (Now 1.402(e)), which is her burden. Alvarez. v. Meadow Lane Mall, 560 N.W.2d 588, 592 (Iowa 1997) Out court has adopted a four-part test:

"Relation back is dependent upon four factors, all of which must be satisfied: (1) the basis claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identify, the action would have been brought against it and (4) the second and third requirements must have been fulfilled within the prescribed limitations period."

Porter v. Good Eavespouting, 505 N.W.2d 178,181 (Iowa 1993)

The linchpin is notice, and notice within the limitations period. Of course there is an element of arbitrariness here, but that is characteristic of any limitations period. And it is

arbitrariness imposed by the legislature and not by the judicial process. Id.

There has been no showing that any of the manufacturers or distributors had notice until they were served sometime in late January 2001 or early February 2001 (Maxxim and Baxter were served on l-24-01: Safeskin on 1-15-01: McKesson on l-15-01: Ansell Healthcare on l-20-01: and Kreiser's was served on 2-2-01).

Although now moot, because of the Court's finding, the actions against the manufacturers/distributors would be not subject to the relation back, and even if August 31, 1998, is the starting date of the limitation period, there is no relation back for the filing against the manufacturers/distributors.

* * *

STAY OF MANUFACTURERS' CLAIM

Iowa Code section 613.18(3) provides:

"An action brought pursuant to this section, where the claimant certifies that the manufacturer of the product is not yet identifiable, tolls the statute of limitations against such manufacturer until such time as discovery in the case has identified the manufacturer."

The plaintiffs, in paragraph 29 of their amended petition, state they they "are currently not knowledgeable of the identity of the "unknown manufacturers" or the Unknown Distributors" of the latex examination gloves used by Mary Greeley in 1991 through 1996; that they are unable to ascertain the names of these defendants without the use of the discovery process and

will use every effort to determine their identifies and sufficiently amend with the Court's approval to give timely notice to said defendants."

In argument there appeared to be no dispute that the plaintiffs' attorney, on January 2, 2001, obtained a list of manufacturers and distributors utilized by Mary Greeley for the years in question through discovery. The petition was amended and filed on January 11, 2001, with the order granting the amendment filed on January 127, 2001. The manufacturers (Regent Medical, Maxxim Medical, Ansell Healthcare, Safeskin Scientific and Sage Products) each assert the action is time-barred against each of them. l They argue that even taking the diagnosis date of August 31, 1998 at the time the clock begin, it was only extended for one day after the identification to January 3, 2001.

The Court does conclude that the statement in the petition constitutes a certification that the manufacturer is not yet identifiable, pursuant to section 613.18(3) I.R.C.P. 80 (Now 1.1413) provides that counsel's signature shall be deemed certificate that the information in a pleading is well grounded in fact. None of the manufacturers/distributors appear to be prejudiced by the fact it lacked any further formal verification. But, the Iowa court had held that the tolling of the statute of limitation, under section 613.13(3) means that the time between the filing of the certification and the identification of the manufacturer is to be deducted from the total elapsed time when computing the date of the expiration of the two-year statute of limitations under section 614.1(2). "In other words, the two-years clock of Iowa Code section 614.1(2) stops ticking on the plaintiffs' section 613.18(3) cer6tificate: when the manufacturer is identifies, the clock begins to tick again:

Harrington v. Toshiba Maching Co., 562 N.W.2d 191,192 (Iowa 1997).

In Harrington, the plaintiff's certification was two days before the limitations expired. Three months later, th eidentity of the manufacturer was learned, but suit was not brought until fifteen months after that. the court states that "the plaintiffs were left with only two days to file the suit following the identification of the manufacturer." Accordingly, even if August 31, 1998 was the date the limitations began, it appears, per Harrington, that the statute against the manufacturer was time-barred, in any event, on January 3, 2001. And the amended petition listing the manufacturers was not filed until January 11, 2001.

Therefore, the actions against the manufacturers, Regent Medical, Maxxim Medical, Ansell Healthcare Products, Inc. Safeskin Scientific Corp. and Sage Products, Inc. are DISMISSED not only under Iowa VCode section 614.1(2), but also for their non-compliance with any application of Iowa Code section 613.18(3).

* * *

DISTRIBUTORS

Mckesson, Baxter Healthcare and Kreiser's are distributors of latex gloves. They were not names until the manufacturers, and the same dates are applicable to each of them. However, the tolling of the statute of limitations under Iowa Code section 613.18(3) relates to "manufacturers". So the case, even assuming the plaintiffs' srguments that the limitation perios was on the diagnosis date of 8-31-98, since section 613.18(3) does not apply to distributors, there is no additional tolling, and the action against McKesson General Medical Corp., Baxer

Healthcare Corp. and Kreiser's, Inc. are additionally DISMISSED as the petition against them was not filed until January 11, 2001, well past two years from the date the plaintiffs concede is the beginning date of the two-year statute.

SAGE PRODUCTS SEPARATE MOTION

Lastly, Sage Products Inc., a manufacturer, filed a separation motion for summary judgment which was not formally resisted at the hearing. Sage asserts that it did not distribute latex gloves to Mary Greeley Medical Center until October of 1996, well after Gretchen's employmen tterminated in October 1995. Although Gretchen alleges she was hospitalized at Mary Greeley in June 19197 for the birth of her child, and was then exposed to latex, only chemotherpay gloves were distributed byu Sage to Mary Greeley between October 1996 tjrpigj 1997; these type of gloves are specialty gloves and would not have been used in treating maternity patients.

There were no opposing affidavits or formal resistance to this motion for summary judmgnet filed by Sage Products.

Accordingly, the separate motion (unrelated to the limitation issue), filed by Sage Products, Inc. is SUSTAINED, and it is DISMISSED, at plaintiffs' cost.

KREISERS SEPARATE MOTION

Kreiser did file a separate motion for summary judgment as a distributor, that pursuant to Iowa Code section 613.18(1)(a) it is immune from any suit based upon strict liability in tort or breach of implied warranty of merchantability which arises solely from an alleged defect in the original design or

manufacture of the product. That issue was not argued to the Court.1 The plaintiffs resisted that motion, as not timely.

The Court will not address its merits at this time, believing that it is moot, and the action against Kreiser has been dismissed summarily under Iowa Code section 614.1(2), as well as finding that tolling of the statute of limitations by Iowa Code section 613.18(3) is not applicable to it.

* * *

Accordingly, the action against the defendants, and each of them, are summarily DISMISSED, at the plaintiffs' cost.

Dated February 22, 2002.

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RONALD H. SCHECHTMAN,
JUDGE - SECOND JUDICIAL
DISTRICT.

IN THE COURT OF APPEALS OF IOWA

No. 3-119 / 02-0437
Filed May 14, 2003

GRETCHEN W. THOMPSON and TODD D. THIOMPSON, both individually and for and on behalf of their minor children, MAREIKA L. AND JAKE A THOMPSON, minors,
Plaintiffs-Appellants,

vs.

MARY GREELEY MEDICAL CENTER, PLAYTEX PRODUCTS INC., REGENT MEDICAL, s division of SSL AMERICANS, INC., MAXXIM MEDICAL CORP., ANSELL HEALTH CARE PRODUCTS, INC., SAFESKIN SCIENTIFIC CORP., SAGE PRODUCTS, INC., McKESSON GENERAL MEDICAL CORP., BAXTER HEALTHCARE CORP., KREISERS, INC., THE McFARLAND CLINIC, P.C., DR. JAMES DOWNARD, AND DR. TERRY McGEENEY
Defendants-Appellees.

Appeal from the Iowa District Court for Story County, Ronald H. Schechtman, Judge.

Plaintiffs appeal the grant of summary judgment to defendants due to untimliness under the statute of limitations in this combined medical malpractice and products liability case. **AFFIRMED.**

Heard by Sackett, C.J. and Huitink and Vogel, JJ.

HUITINK, J.

I. Background Facts and Proceedings.

On August 30, 2000, Gretchen Thompson, her husband, and children sued Mary Greeley Medical Center, the McFarland Clinic, Dr. Downard, and Dr. McGeeney, for edical malpractice claiming they failed to properly diagnose and treat Gretchen's latex allergy. Their petition also included product liability claims against unknonw manufacturers and sitributors of latex gloves. On January 12, 2001, Thompsons amended their petition naming Regent Medical, Maxxim, Medical Corp., Ansell Health Care Products, Inc., Safeskin Scientific Corp., and Sage Products, Inc as manufacturers of latex gloves.[1] McKesson General Medical corp., Baxter Healthcare KCorp., and Kriesers, Inc., were names as distributors of the latex gloves.

All of the defendants moved for sumary judgment arguing the Thompsons' claims were barred by applicable two-year statutes of limitations. See Iowa Code [sections] 614.1(2),(9) (1999). The trial court determined the statute of limitations could have started to run when Thompson developed a rash while wearing latex gloves in 1996. The court's ruling further provides:

> That inquiry notice was there on August 6, 1998. Gretchen heard her treating physician expound "it sound like it might be a latex allergy," and referred her to an allergist to confirm it. She knew about her previous use of latex on that date and her reaction. She knew about her

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1 The district courr granted summary judgment to Sage Products, Inc. because it provided latex gloves to Mary Greeley after the time Thompson worked there. Sage Products is not a party to this appeal.

> allergies, not only hives, itching and rhinitis, but also her violent reactions to certain foods. On that date, she was aware that she had used latex gloves at Mary Greeley and that Drs. Downard and McGreeney had told her, contrary to Carter, that it was hormonal. And she also knew that the latex gloves were manufactured and distributed by someone other than the physicians and hospital. She was on inquiry, and she started her investigation.

The court accordingly concluded the Thompsons' medical malpractice and products liability claims were time barred and entered summary judgment dismissing Thompsons's lawsuit against all of the defendants, resulting in this appeal.

II. Standard of Review.

We review a district court's ruling on a motion for summary judgment for correction of errors of law. *Financial Mktg. Servs., Inc. v. Hawkeye Bank & Trust,* 588 N.W.2d 450,455 (Iowa 1999). Summary judgment iwll be upheld when the moving party shows ther are no genuine issues of material fact and the party is entitled to judgment as a matter of law. See Iowa R.Civ. P. a.981(3). In reviewing a motion for summary judgment, we consider the evidence in a light most favorable to the party opposing the motion. *Cripen v. City of Cedar Rapids,* 618 N.W.2d 562,565 (Iowa 2000)

III. Statute of Limitations.

Thompsons contend the summary judgment record indicates that they did not know until August 31, 1998, that Thompson had a latex allergy. They allege that until Gretchen Thompson

discussed the results of a blood test with Dr. Gottlieb on that date, she did not have sufficient facts to realize she had a latex allergy and was not, as the trial court found, earlier placed on inquiry notice for purposes of the statute of limitations. We disagree.

A. Medical Defendants.

Iowa Code section 614.1(9) requires medical malpractice actions to be commenced

> within two years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of, the injury or death for which damages are sought in the action . . .

The supreme court has interpreted section 614.1(9) as follows:

> Subsection 9 means the statute of limitations now begins to run when the patient knew, or through the use or reasonable diligence should have known, of th einjury for which damages are sought. The statute begins to run even though the patient does not know the physician had *negligently* caused the injury.

Langner v. Simpson, 533 N.W.2d 511,517 (iowa 1995) (emphasis in original).

The ultimate question under section 614.1(9) is when a plaintiff has sufficient knowledge to place the plaintiff on inquiry notice to investigate further. *McClendon v. Beck*, 569

N.W.2d 382,395 (Iowa 1997). The supreme court has also held:

> [T]he statute begins to run when a person gains knowledge sufficient to put the person on inquiry. On that date, the person is charged with knowledge of facts that would have been disclosed by a reasonably diligent investigation. Moreover, once a person is aware that a problem exists, the person has has a duty to investigate even though the person may not have knowledge of the nature of the problem that caused the injury.

Langner, 533 N.W.2dd at 518. Th elimitations period is the outer time limit for making the investigation and bringing the action. Sparks v. Metalcraft, Inc., 408 N.W.2d 347,351 (Iowa 1987).

Based on our review of the undisputed facts included in the summary judgment record, we conclude the district court properly found plaintiffs wereplaced on the requisite inquiry notice on August 6, 1998, when Dr. Carter told Gretchen Thompson she might have a latex allergy. The district court properly concluded the statute of limitations began to run on August 6, 1998, and plaintiffs' suit, filed on August 30, 2000, was barred by section 614.1(9).

B. Manufacturing and Distributing Defendants.

Thompsons' products liability claims against the manufacturing and distributing defendants is governed by the two-year statute of limitaitons found in section 614.1(2). For purposes of our discussion we will assume Thompson suffered a "pure latent" injury. Th ecommon law discovery rule sis applicable to this class of cases. See *Borchard v. Anderson*,

542 N.W.2d 247,250 (Iowa 1996); LeBeau v. Dimig, 446 N.W.2d 800,802 (Iowa 1989). Under the common law discovery rule, an action does not accure until the plaintiff knows or in the exercise of reasonable care should ohave nown both the fact of the injury and its cause. *Frideres v. Schiltz,* 540 N.W.2d 2161,268 (Iowa 1995).

Like the medical malpractice discovery rule, the common law discovery rules also embraces the concept of inquiry notice. See *Woodroff e v. Hasenclever,* 540 N.W.2d 45,48 (Iowa 1995). "[T]he statute of limitations begins to run when a plaintiff first becomes aware of facts that would prompt a reasonably prudent person to begin seeking information as to the problem and its cause." *Estate of Montag v. T.H. Agric. & Nutrition Co.*, 509 N.W.2d 4690,470 (Iowa 1993). The supreme court has further stated:

> Moreover, the duty to investigate does not depend on exact knowledge of the nature of the problem that caused the injury. I tis sufficient that the person be aware that a problem existed. One purpose of the inquiry is to ascertain its exact nature.

Franzen v. Deere & Co., 377 N.W.2d 660, 662 (Iowa 1985)

In this case, our analysis under the comon law discovery rule is the same as our analysis under the medical malpractice discovery rule. We determine plaintiffs were put on inquiry notice as early as August 6, 1998, when Thompson's treating physician told her she might have a latex allergy. We conclude plaintiffs' claims against the manufacturing and distributing defendants were time barred by the applicable statute of limitations. Iowa Code [sectionn] 614.1(1)(2).

We affirm the district court's grant of susmmary judgment to defendants in this case.

AFFIRMED.

Filed
Aug. 01 2003
Clerk Supreme Court

IN THE SUPREME COURT OF IOWA
No. 02-437

Story County No. LACV039385

ORDER

GRETCHEN W. THOMPSON and TODD D. THOMPSON, both individually and for and on behalf of their minor children, MAREIKA L. and JAKE A. THOMPSON, Minors,
Plaintiffs-Appellants,

vs.

MARY GREELEY MEDICAL CENTER, PLAYTEX PRODUCTS, INC., REGENT MEDICAL, a division of SSL AMERICAS, INC., MAXXIM MEDICAL CORP., ANSELL HEALTH CARE PRODUCTS, INC., SAFESKIN SCIENTIFIC CORP., SAGE PRODUCTS, INC., McKESSON, GENERAL MEDICAL CORP., BAXTER HEALTHCARE CORP., KREISERS, INC., THE MCFARLAND CLINIC, P.C, DR. JAMES DOWNARD and DR. TERRY McGEENEY,
Defendants-Appellees.

After consideration by this court en banc, Larson and Ternus, JJ., not participating, further review of the above captioned case is denied.

Dated this 1st day of August, 2003.

THE SUPREME COURT OF IOWA

By _____
Louis A. Lavorato, Chief Justice